UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 14

Hortense Moss	)	
	)	
Petitioner	)	
and	)	
	)	
Go Ahead North America, LLC	)	Case No. 14-RD-1946
	)	
Employer	)	
and	)	
	)	
Laborers Local 509	)	
	)	
Union	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

I. SUMMARY OF CASE:

On November 1, 2010, Hortense Moss ("Moss") petitioned for decertification of the Union. An election was held on December 10, 2010, the results of which were 68 votes for the Union and 51 votes against.

On December 17, 2010, Go Ahead North American, LLC ("Go Ahead") filed timely objections to the election. The objections were based on post-petition promises of benefit communicated by the Union to employees through flyers handed out at the Go Ahead premises. The promises consisted of waivers of dues and fees that had accrued and offers of insurance programs unrelated to negotiations. The objections further cited other general misconduct.

The Regional Director ordered a hearing on the objections, which was held on January 4, 2011. All parties attended. Evidence produced by the Union at the hearing pursuant to subpoena further disclosed that the Union's waivers of dues and fees were not authorized by the

International and violated the Union's Constitution. As a result, the Union's material misrepresentation concerning the waivers was reviewed by the Hearing Officer as part of the objections.

On February 4, 2011, Hearing Officer Krista Lopez issued her report in which she recommended that the Board overrule the Employer's objections. Exceptions to that report were filed contemporaneous with this brief.

II. FACTS:[1]

The events in this matter begin with Go Ahead's predecessor company, Atlantic Express of Missouri. In 2010, Atlantic lost the bid for the St. Louis VICC program. Go Ahead was the successful bidder. This essentially put Atlantic out of business in St. Louis, and Go Ahead proceeded during the summer to take applications from Atlantic drivers. (Tr. 17) By August 2010, Go Ahead had a full complement of approximately 140 drivers and monitors, 75%-80% of whom were former Atlantic employees. As a result, Go Ahead granted the Union's demand for recognition that month, and Dan Gilman, General Manager of Go Ahead, so advised employees. Bargaining began in August, and the Union continued to represent employees in disciplinary matters and other disputes. (Tr. 18-20) Nothing was said to employees about their continuing obligation to pay dues since their status as members of the Union was unchanged. (Tr. 34; 54)

In October 2010, a decertification petition was filed by Felicia Williams. Moss testified that subsequent to the petition, Union organizer Andre LaGrand asked Williams why she had filed the petition. Moss and Williams told him that they had been getting poor representation from the Union. Williams told him that if the Union wanted the employees so bad, they should represent them without charge for one year. LaGrand replied they could not do that. Although LaGrand testified, he did not deny that conversation. (Tr. 32)

[1] The testimony at the hearing and the facts set forth in this brief are for the most part undisputed.

Shortly thereafter, Williams told Moss that she had to be on the Union's board in order to communicate what the employees wanted. She said the employees were required to stay with the Union for another year before they could get rid of it. Moss was surprised and went to the NLRB to find out what was going on. She learned that Williams had withdrawn her petition. When she confronted Williams about this, Williams told her the Union paid her money she felt was owed her and that was the reason she withdrew the petition. (Tr. 32-33)

Moss then secured 92 signatures out of the then 147 employees and filed the instant decertification petition with the NLRB. A few days later, LaGrand approached her and said he could not believe she filed a petition. Moss replied that the employees no longer wanted the Union. LaGrand said that Moss should have been on the Union's executive board if she had concerns. Moss replied she tried but another employee got the position. LaGrand told her that she still could be on the board but that she had to be current with her dues. He said she owed from May 2010 to the present date. (Tr. 35-37) Again, although LaGrand testified at the hearing, he did not deny that conversation.

Although the Hearing Officer's Report acknowledges the Union's position that one had to be current with dues in order to be on the executive board, the Report still finds inconsistently that there was no proof the Union expected Go Ahead employees to pay dues prior the waiver. The record shows, without contradiction and contrary to the Hearing Officer's Report, that the Union has been aggressive in collecting delinquent dues. Gilman testified that when he was the general manager at Atlantic, the Union often sent emails to the corporate office in New York demanding deductions for dues arrearages. (See e.g. GA Exh. 2) He also received communications from the Union to the effect that he would have to terminate employees who were in arrears. (Tr. 20)

Although there was a check-off provision in their contract, employees often worked during June and owed dues for that month but did not work in July or August. Thus, there was no check from which dues could be deducted. (Tr. 21) In fact, according to John Chambers, Business Manager for the Union, employees owed dues for May and June 2010 because Atlantic failed to deduct them. (Tr. 90) Chambers also testified that some employees opted to pay dues directly rather than have them deducted from their checks so that collection actions were more likely to occur in those situations. (Tr. 90) Moss testified that she was dunned for back dues in 2008 and 2009, and money was taken from her check even though she protested that she did not owe the dues. (Tr. 37-40; GA Exh. 7)

Moss further noted that she was at a Union meeting at which the Union's business manager at the time, Angela Jones, told employees that dues not deducted by Atlantic were the employees' responsibility and that the Union was acting to collect them. (Tr. 41-42) This is consistent with the Union's membership requirements, as set forth in Articles 5 and 6 of the Atlantic Express labor contract. Article 5 provides that a member who is delinquent in payments after 60 days will be suspended and subject to further fees. Article 6, §A requires delinquent members to make arrangements with the Union for payment, and §D states members not working during the summer who have not had their dues deducted are responsible for payment. (GA Exh. 6) Chambers testified that the Union expects members to pay their dues even if not deducted from their paychecks. (Tr. 83; 85)

Employee Donna Brush described an incident in which she felt dues were improperly deducted from her paycheck, and she got her money back after a heated confrontation with the Union's previous business manager, Mark Winston. (Tr. 51-54) Brush further testified that she attended a Union meeting a few days prior to the filing of the Moss decertification petition.

Winston told employees that the Union preferred to have employee representatives on the board from all of the companies they represent. However, to be eligible for board membership, Go Ahead employees would have to bring their dues current. Winston noted that one of the Go Ahead employees who was a former Atlantic driver continued to pay her dues faithfully so that she would be eligible for board membership. (Tr. 54-57)

The Hearing Officer's Report at page 9 states: "The Union chose to view the employees hired by Go Ahead as a new unit and decided to bring everyone in with a clean slate by waiving the requirement to pay those delinquent dues." That would not be a problem if the "clean slate" had been communicated after Go Ahead hired the employees but before the decertification petition. In acknowledging that there were delinquent dues (and the undisputed evidence shows that dues had been considered owed during employment with Go Ahead), the waiver of those dues subsequent to the petition must be considered a benefit conferred for the purpose of securing a favorable vote. As Chambers testified, the purpose of a decertification campaign is to retain the Union's members. (Tr. 79-80)

That the Union continued to consider the Go Ahead employees members is further shown by a letter dated September 9, 2010 mailed to their homes. It is addressed to "officers and members", and the salutation is "Dear Brothers and Sisters." The letter discusses the Union being placed under International supervision due to financial mismanagement "in order to correct financial malpractice or corruption" and provides notice of a telephone hearing to confirm the supervision status. (Tr. 22; GA Exh. 3)

Subsequent to the filing of the decertification petition, the Union embarked on a campaign to secure a favorable vote. On November 22, it requested a variance from the Laborers Constitution in order to expand its executive board from seven to nine members. That

request was granted on November 29, and the letter granting the request was distributed to Go Ahead employees. (Tr. 22; GA Exh. 4) Recognizing that Go Ahead employees were behind in dues and therefore could not become board members, the Union issued a flyer to Go Ahead employees waiving past dues as well as future dues until a contract is negotiated. The waiver of dues became a topic of conversation among the Go Ahead employees. (Tr. 42-43; 57; 95; GA Exh. 8)

It is important to note the multi-faceted problems with this promise. Aside from simply purporting to waive a debt, the Union lacked authority under the Laborers Constitution to make this promise. Article XVIII, §8 of the Constitution (Jt. Exh. 1), at pages 51-52, specifies the minimum initiation fees, readmission fees and dues assessments for members. Even dues for apprentices, which can be reduced, cannot be eliminated.

In February 2008, the Union received a variance in dues from the International for Atlantic Express monitors but not drivers. (Jt. Exh. 2G) Nevertheless, the monitors were required to pay $25.00 per month. A similar variance was granted on February 19, 2009, however drivers were to be assessed $29.00 per month and monitors $25.00 per month. (Jt. Exh. F)

On August 9, 2010, the supervisor appointed to monitor the Union requested a variance to waive the initiation and readmission fees. There was no request for a variance in dues levels. (Tr. 70-71; Jt. Exh. 2E) On August 19, 2010, the International president granted the waiver of initiation and readmission fees through December 31, 2010, however he stated:

> The dispensation affects only the constitutionally mandated initiation and readmission fees and does not affect other obligations, including the Local Union's per capita tax obligations to the International Union.

(Jt. Exh. 2D) The International president confirmed the limited nature of the dispensation and its expiration on December 31, 2010. (Jt. Exh. 2C) On December 10 and 14, the Union requested another extension of the waiver to December 31, 2011. (Jt. Exhs. 2A-B) There is no evidence that the extension has been granted nor is there any evidence that a dispensation on dues was requested or received. Chambers testified that the Union could not waive dues without permission from the International. (Tr. 70; 86) Despite this evidence, the Hearing Officer declined to recommend a setting aside of the election because the misrepresentation did not involve the NLRB or forged documents. (HO Rep. @ p. 20)

In addition to promising a waiver of dues and fees, the Union distributed to Go Ahead employees a flyer offering a variety of insurance benefits to its members. These flyers were distributed at the entrance to Go Ahead's terminal. Nothing was said to all employees about having to pay for these benefits at the time of distribution. (Tr. 43-44; GA Exh. 9) Chambers noted that these benefits were not negotiated and were offered in addition to whatever the Union was able to negotiate. (Tr. 77) LaGrand testified that he explained the cost of the prescription benefit to employees who attended union meetings, but he acknowledged that only a handful of Go Ahead employees attended the meetings. (Tr. 99-100) LaGrand admitted that in order to get these benefits, the employees had to vote for the Union. (Tr. 108-09)

It is interesting that the Hearing Officer referred to these benefits as nothing more than the promotion of existing benefits to members who already were entitled to them since the Union already was representing them. (HO Report @ p. 19) This observation is inconsistent with the notion that the Go Ahead employees were to be treated for dues purposes as if they were newly organized without any obligations to the Union.

III. ARGUMENT:

The Hearing Officer likened the Go Ahead situation to that in the Supreme Court's decision in *NLRB v. Savair,* 414 U.S. 270(1973). She concluded that the waivers by the Union were nothing more than removing an "artificial obstacle to the employees' endorsement of the union"-- terminology taken from the *Savair* decision. However, the *Savair* case stands for exactly the opposite proposition under the facts in the instant case.

Savair involved an initial organizing campaign in which the union promised to waive initiation fees for employees who became members prior to the election but not those who became members after the election. The Court held such a promise to be an unfair labor practice because the fee waiver was a benefit that necessarily was contingent on early membership and was unfair to those who might oppose the union and fail to vote for it. In so holding, the Court likened such union promises to promises by employers of pay increases prior to an election. The opinion states:

> Congress has also listed in § 8 (b) of the Act "unfair" labor practices of unions. 29 U. S. C. § 158 (b). There is no explicit provision which makes "interference" by a union with the right of an employee to "refrain" from union activities an unfair labor practice.
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> Section 8 (c), however, provides:
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> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, *if such expression contains no threat of reprisal or force or promise of benefit.*" 29 U. S. C. § 158 (c) (emphasis added).
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> **********
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> The NLRB itself has recognized in other contexts that promising or conferring benefits may unduly influence representation elections. See *e. g., Wagner Electric Corp.*, 167 N. L. R. B. 532, 533 (grant of life insurance policy to those who signed with union before representation election "subjects the donees to a constraint to vote for the donor union");

> *General Cable Corp.*, 170 N. L. R. B. 1682 ($ 5 gift to employees by union before election, even when not conditioned on outcome of election, was inducement to cast ballots favorable to union); *Teletype Corp.*, 122 N. L. R. B. 1594 (payment of money by rival unions to those attending pre-election meetings).

Id @ 278-9; footnote 6.

In essence, although *Savair* makes clear that union promises of benefit are to be treated the same as employer promises, the case itself is distinguishable from the instant case. The employees in most organizing campaigns are not already members of the union so that waivers of dues and fees are not a benefit because no dues and fees have as yet accrued and may never accrue if the employee never voluntarily becomes a member or is not subject to a union security provision. In a decertification election such as in the instant case, the employees already are members and may have accrued dues and fee obligations. In fact, the evidence shows conclusively that insofar as the Union was concerned past dues had accrued and were owing. This is shown by pre-petition statements that members had to bring their dues up to date in order to secure membership on the executive board and that Go Ahead employees were not up to date on dues. Thus, the waiver of delinquencies and future dues and fees is a promise of benefit indistinguishable from an employer's promise to raise wages prior to an election.

There was nothing artificial in the waiver. The waivers involved monies that either were owing to the Union or at least had not been waived prior to the petition. There is nothing in the record to suggest that the Union would refrain from collecting the delinquencies prior to the waiver, particularly since the record shows they have collected past due monies in the past and had not been authorized by the International to waive dues.

The Hearing Officer noted the testimony of Union witness Chambers that one or two months of dues may have been owed by 75-80 percent of the unit. And she accepted the testimony of Brush and Moss who said the Union enforced dues obligations in the past through a union security clause. She

concluded that the Union did have such a practice when a contract was in effect but stated further that Go Ahead did not demonstrate such a practice when no contract was in effect. She stated further that the Union had no way to collect such dues. (HO Report @ pp.13-14) However, this is splitting a hair that will not separate. The fact is that Go Ahead demonstrated the Union's practice generally of collecting delinquent dues, which is tantamount to the clear impression among employees that they were, or may have been, on the hook for past dues.

The Hearing Officer's justification that the Union enforces dues delinquencies when a contract exists but not when there is no contract ignores the reality of the situation. There was no history of what the Union does when no contract exists. Chambers, who has been with the Union over 20 years, could not recall a decertification case. He did recall that dues continue to be collected in contract reopener situations. (Tr. 79; 84-85)

The question of dues practice must be analyzed from the viewpoint of the employee facing a decertification vote. On the record in the instant case, could the employees have reasonably believed that past dues could be collected and that the waiver influenced their vote? Clearly, the Union made no promise not to collect dues prior to the petition. And only a few months transpired between the recognition of the Union and the decertification petitions. Why waive past dues if there was no intent to collect them prior to the petition?

In *Loubella Extendables, Inc.*, 206 NLRB 183 (1973), the Board held that the waiver of back dues and fees owed by the voters in an "RM" petitioned election was objectionable since the employees "could reasonably have expected the Union to demand payment thereof." *Id. At 184.* The Hearing Officer distinguished *Loubella* in that the dues delinquency accrued under an existing labor contract with a valid union security clause. But that is not a legitimate distinguishing factor since the dues obligation of a union member does not exist by virtue of a labor contract but rather by the fact of the

membership agreement. The union security clause does nothing more than require one to be a member of the union and provide a procedure for automatic dues collections. To be sure, it makes collection easier for a union, but it is not the genesis of the obligation. The Go Ahead record demonstrates this in testimony that some employees paid dues directly rather than by payroll deduction and that June dues were not subject to payroll deduction and were collected independently. Furthermore, the record shows that membership on the Union's board required a member to be current with dues so that the waiver became a benefit to those who sought board membership. Delinquent dues also can be enforced by denying the employee the benefits of membership such as the insurance benefits that the Hearing Officer noted were available to members.

In *McCarty Processors, Inc.*, 286 NLRB 703 (1987), the Board distinguished decertification elections from initial organizing elections and held that the waiver of dues in the course of a decertification campaign was improper. The Board noted that this was the case even after the contract expired and the union security clause no longer was applicable since the members still had an obligation to pay dues. The Hearing Officer distinguished *McCarty* on the basis that the union unsuccessfully attempted to get the employer to deduct the dues. But this fact does not alter the principle that a union security clause is not the *sine qua non* for an enforceable obligation to pay dues.

The Hearing Officer further cited *Andal Shoe, Inc.*, 197 NLRB 1183 (1972), for the proposition that the union's constitution and bylaws in that case did not require the collection of dues for employees who were suspended due to the delinquencies and who were later reinstated to membership. The *Andal* situation is distinguishable from Go Ahead where membership continued from the predecessor to the successor. The Hearing Officer's citing the Union's constitution for the absence of a dues collection requirement is inconsistent with ignoring the fact that the dues waiver was unconstitutional.

Furthermore, one must accept as axiomatic that a constitution which sets up a monetary obligation expects enforcement of that obligation without having to expressly so state.

In ordering the objections to a hearing, the Regional Director stated:

> In light of the conflicting evidence and case law as to when 'promises' by a labor organization may be considered improper inducements as opposed to just campaign puffery, I find that the evidence submitted by the Employer in support of this Objection raises substantial issues which can best be resolved by the receipt of record testimony.

Thus, he recognized that issues of misrepresentation were raised in addition to the promise of benefit. Also, the Union's constitution and the internal waiver letters were not available to the company prior to the hearing subpoena so that the misrepresentation could not have been discovered until those documents were supplied. Fairness dictates that the issue be considered as part of the objections, and the Hearing Officer recognized the issue but rejected the objection substantively on the basis of the narrowness of Board law on campaign misrepresentations. There is no question but that the Union's waiver of dues was a misrepresentation, particularly since it had recent correspondence from the International limiting waiver authorization to initiation and readmission fees. And there also is no question but that employees could not possibly evaluate whether the Union was in fact authorized to make the waiver.

The Hearing Officer disposed of the misrepresentation argument by citing the Board's long-standing holding in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). However, the misrepresentation here is in a different class from typical campaign puffery. The fact that the Union had no authority to waive delinquent dues—indeed was specifically precluded from doing so by virtue of International correspondence—could not have been known by employees or Go Ahead. The violation of the International's imprimatur still would not have been known except for the submission of documents on the day of the hearing pursuant to Go Ahead's subpoena. The Hearing Officer stated at

page 20 of her Report: "I conclude that the subpoenaed documents were provided by the Union prior to the hearing, and the Employer was afforded sufficient time to review the documents before presenting its evidence." This finding is belied by the record. Counsel for Go Ahead objected to the lack of time for case preparation and noted that the subpoenaed documents were first presented for review at the hearing. (Tr. 12-13) Furthermore, there clearly was no way to secure information on the Union's waiver authority prior to filing the objections so that the general Objection #2 must be accepted as permitting the waiver authorization issue to be determined.

As to the substance of the issue, the Eighth Circuit interpreted *Midland* as follows:

> The Board has a wide degree of discretion in deciding whether to set aside an election. *Id.* When an objection is based on allegations of oral or written representations made during an election campaign, the NLRB now applies *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982). *See NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983) (explaining NLRB's changes in position); *St. Margaret Mem. Hosp. v. NLRB*, 991 F.2d 1146, 1157 n.11 (3d Cir. 1993) (citing NLRB decisions applying *Midland* to oral representations). Under *Midland*, the NLRB and courts will not probe into the truth or falsity of the representations. 263 N.L.R.B. at 133. This is so because employees are sophisticated enough to recognize campaign propaganda and weigh it accordingly. *See id.* at 130. Consistent with this view, *Midland* holds that elections cannot be set aside merely on the basis of misleading representations, but can be set aside only when a representation is deceptively made rendering the employees unable to recognize the representation as campaign propaganda. *Id.* at 133, 131.

Bituma Corporation v. NLRB, 23 F.3d 1432, 1437 (8th Cir. 1994). This was not propaganda but a promise designed to affect the vote that the Union knew or should have known it had no authority to make. The falsehood here fits the Eighth Circuit's interpretation of *Midland* as a deceptive representation rendering the employees unable to recognize it as propaganda.

The Union's flyer promising various insurance benefits is objectionable because it involved benefits that the Union was able to produce; it was not tied to negotiations, and there was no indication or disclosure that employees had to purchase the insurance. Furthermore, even if the obligation to

purchase the policies was evident, the promise is no less objectionable. The flyer offered the prospect of favorable rates due to the large membership of the Laborers Union, a benefit that the voter could not secure individually. The promise is no different from that of an employer who offers insurance to employees at discounted rates prior to an election. Moss testified that after the flyer was distributed, employees discussed the benefits they were going to get if they voted favorably. (Tr. 43-44) In *Lalique N.A., Inc.*, 339 NLRB 1119 (2003), the Board distinguished between a union's promise of medical benefits that were tied to negotiations and clear promises to provide benefits that were within the control of the union. [See e.g. *Tio Pepe, Inc.*, 263 NLRB 1165(1982); *Crestwood Manor*, 234 NLRB 1097 (1978)]

Citing *Dart Container*, 277 NLRB 1369 (1985), the Hearing Officer, in overruling the objection, stated at page 19 of her Report:

> There is no evidence the benefits were newly created to encourage support for the Union in the election. The Union was simply promoting an existing union benefit that members were presumably already entitled to given that the Union already represented them at the time of the election. The Board also noted in *Dart Container*, 'Just as an employer can call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits it members currently enjoy.'

This is a remarkable observation because of its inconsistency with the earlier finding of the Hearing Officer that the Union was treating the Go Ahead employees as if they were being newly organized. The Union cannot have it both ways, i.e. new employees for purposes of dues waivers but old employees for purposes of benefit grants.

IV. CONCLUSION

In view of the above and the record as a whole, Go Ahead respectfully requests that the election in the above matter be set aside and a new election directed.

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Dated: February 16, 2011

CERTIFICATE OF SERVICE

The foregoing Brief in Support of Exceptions was filed with the Board via the Board's e-filing procedure and copies sent via U.S. Mail this 16th day of February 2011 to:

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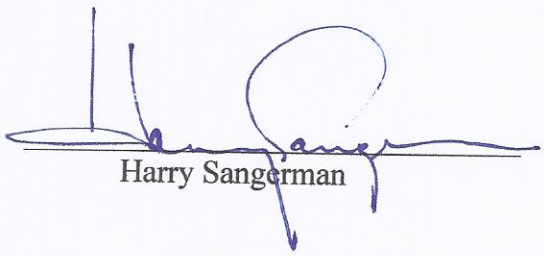

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